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Attorneys for Plaintiff ARC FINANCE GROUP LLC

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ARC FINANCE GROUP LLC, a
Delaware Limited Liability Company,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
JUSTICE; UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION,

Defendants.

Case No.

**COMPLAINT FOR VIOLATION OF
FREEDOM OF INFORMATION ACT [5
U.S.C. § 552]; VIOLATION OF
PRIVACY ACT [5 U.S.C. § 552a]; FOR
DECLARATORY RELIEF AND FOR
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. As President Obama directed on January 21, 2009, “a democracy requires
3 accountability, and accountability requires transparency.” President Obama cited to Justice
4 Louis Brandeis when he said “sunlight is said to be the best of disinfectants.” In his
5 memorandum to the Heads of Executive Departments and Agencies, President Obama instructed:

6 In our democracy, the Freedom of Information Act, which encourages
7 accountability through transparency, is the most prominent expression of a
8 profound national commitment to ensuring an open Government. At the heart of
that commitment is the idea that accountability is in the interest of the
Government and the citizenry alike.

9 The Freedom of Information Act should be administered with a clear
10 presumption: In the face of doubt, openness prevails. The Government should
11 not keep information confidential merely because public officials might be
embarrassed by disclosure, because errors and failures might be revealed, or
because of speculative or abstract fears....

12 2. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §
13 552, and the Privacy Act, 5 U.S.C. § 552a, for injunctive and other appropriate relief. It seeks
14 the disclosure and release of records improperly withheld from Plaintiff ARC FINANCE
15 GROUP LLC, a Delaware Limited Liability Company, by Defendants UNITED STATES
16 SECURITIES AND EXCHANGE COMMISSION (“SEC”) and UNITED STATES
17 DEPARTMENT OF JUSTICE (“DOJ”), including, but not limited to, through the acts of its
18 agent Charles Cain.

JURISDICTION AND VENUE

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21 3. This Court has both subject matter jurisdiction over this action and personal
22 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue
23 lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

24 4. This action is supported – indeed mandated – by the Executive Order of the
25 President of the United States on the Freedom of Information Act, his Memorandum on
26 Transparency and Open Government, and the memorandum of the Attorney General of the
27 United States on the Freedom of Information Act.
28

STATUTORY FRAMEWORK

5. FOIA, 5 U.S.C. § 552, mandates disclosure of records held by a federal agency in response to a request for such records by a member of the public unless such records fall within certain narrow statutory exemptions.

6. The basic purpose of FOIA is to enable the public to hold the government accountable for its actions, through transparency and public scrutiny of governmental operations and activities. Through access to government information, FOIA helps the public better understand the government, thereby enabling a vibrant and functioning democracy.

7. Any member of the public may make a request for records to an agency of the United States under FOIA. An agency that receives a FOIA request must respond in writing to the requestor within 20 business days after receipt of the request. (5 U.S.C. § 552(a)(6)(A)(I).)

8. In response to such request, the agency must inform the requestor whether or not it intends to comply with the request, provide reasons for its determination, and inform the requestor of his or her right to appeal the determination. (*Id.*)

9. A FOIA requestor who has been denied records may appeal the denial to the agency. The agency must make a determination on the appeal within 20 business days of receipt of the appeal. (5 U.S.C. § 552(a)(6)(A)(ii).)

10. A FOIA requestor is deemed to have exhausted all administrative remedies once his or her appeal of a denial has itself been denied. (5 U.S.C. § 552(a)(6).)

11. Upon complaint, a district court has jurisdiction to enjoin the agency from withholding records and to order production of records that are subject to disclosure. (5 U.S.C. § 552(a)(4)(B).)

STATEMENT OF FACTS

12. Plaintiff was a shareholder in a corporation – Heart Tronics, Inc. – that developed a first-of-its-kind ambulatory heart EKG machine in conjunction with technology developed alongside the United States Air Force. Heart Tronics, Inc. has never had any dispute with the Air Force regarding or relating to this technology or the EKG machine.

13. This EKG machine has been proven to save lives, including the life of one Josh

1 Nails – a teenager who would be dead had it not been for a screening using the Heart Tronics
2 device.

3 14. On December 22, 2010, Plaintiffs' counsel wrote to Defendants and requested
4 certain records pertaining to Signalife, Inc., formerly known as Heart Tronics, Inc., under FOIA.

5 15. In a letter dated January 6, 2011, Defendants denied Plaintiff's request for records
6 related to Signalife, Inc., stating that such records could not be produced, pursuant to 5 U.S.C. §
7 552(b)(7)(A) and 17 CFR § 200.80(b)(7)(i), because it would "interfere with [law] enforcement
8 activities." (This letter of denial is attached hereto as Exhibit 1.)

9 16. On February 4, 2011, Plaintiffs' counsel appealed Defendants' decision to
10 withhold the documents that Plaintiff had requested under FOIA. (This letter of appeal is
11 attached hereto as Exhibit 2.)

12 17. On February 17, 2011, Defendants notified Plaintiff by mail that her appeal of the
13 decision to withhold records pertaining to Signalife, Inc. had been denied. (This letter of denial
14 of appeal is attached hereto as Exhibit 3.)

15 18. Plaintiff alleges that there is no "law enforcement" reason to withhold the
16 requested documents as Defendants claim, and that Defendants are intimately aware that there
17 are no such "law enforcement activities" that are ongoing or ever were ongoing. Thus,
18 Defendants have resorted to using false excuses in order to avoid complying with FOIA.

19 **REQUESTED RELIEF**

20 WHEREFORE, Plaintiff prays that this Court:

21 A. Order Defendants to disclose the requested records in their entireties and
22 make copies available to Plaintiff;

23 B. Order Defendants not to destroy any records related to Plaintiff's Freedom
24 of Information Act request;

25 C. Order Defendants to produce destruction documents for all records related
26 to this complaint that were already destroyed;

27 D. Provide for expeditious proceedings in this action pursuant to 28 U.S.C. §
28 1657;

1 F. Award Plaintiff its costs and reasonable attorney's fees incurred in this
2 action, as provided in 5 U.S.C. § 552(a)(4)(E)); and

3 F. Grant such other relief as the Court may deem just and proper.

4 Respectfully submitted,

5 Dated: June 13, 2011

MITCHELL J. STEIN & ASSOCIATES LLP
MITCHELL J. STEIN
ERIKSON M. DAVIS

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8 By: /s/
9 Mitchell J. Stein
10 Attorneys for Plaintiff
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2736

Office of FOIA Services

January 6, 2011

Mr. Philip A. Kramer
Kramer & Kaslow
23901 Calabasas Road, Suite 2015
Calabasas, CA 91302

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 11-02227-FOIA

Dear Mr. Kramer:

This letter responds to your request, dated December 22, 2010, and received in this office on December 27, 2010, for certain records pertaining to Signalife, Inc.

We are withholding nonpublic records that may be responsive to your request under 5 U.S.C. § 552(b)(7)(A), 17 CFR § 200.80(b)(7)(i). This exemption protects from disclosure records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement activities. Since Exemption 7(A) protects the records from disclosure, we have not determined if other exemptions apply. Therefore, we reserve the right to assert other exemptions when Exemption 7(A) no longer applies.

Because the underlying circumstances may change, we may later disclose some of the exempt records. If you wish, you may request them again six months from the date of this letter.

You have the right to appeal our decision to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

EXHIBIT 1

Mr. Phillip Kramer

11-02227-FOIA

January 6, 2011

Page Two

Send your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2736, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact Ronnye L. Hall of my staff at hallr@sec.gov or (202) 551-8353. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,



John Livornese
FOIA Branch Chief

THE DOCUMENTS OF
KRAMER & KASLOW

A PROFESSIONAL CORPORATION
WWW.KRAMER-KASLOW.COM

TELEPHONE: (818) 224-3900

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23901 CALABASAS ROAD, SUITE 2013
CALABASAS, CALIFORNIA 91302

February 4, 2011

FOIA Appeals Officer
FOIA Services of the Securities and Exchange Commission
Station Place
100 F Street, NE
Mail Stop 2736
Washington, D.C. 20549

Re: Freedom of Information Act Appeal of
Request No. 11-02227-FOIA

Dear FOIA Appeals Officer:

Please be advised that I represent ARC FINANCE GROUP, LLC and TRACEY HAMPTON-STEIN. This is an appeal, on behalf of my clients under the Freedom of Information Act.

On December 22, 2010, I requested documents under the Freedom of Information Act on behalf of my clients. The request was assigned the following identification number: Request No. 11-02227-FOIA. On January 8, 2011, I received a letter signed by Mr. John Livornese denying the FOIA request made on behalf of clients.

I hereby appeal the denial of Request No. 11-02227-FOIA.

A copy of the agency determination, which is the subject of this appeal, is attached hereto.

THE LAW OFFICES OF

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LEGAL ARGUMENT

In its response denying disclosure of the requested information, the Securities and Exchange Commission ("SEC") asserts the information requested is exempt from disclosure under 5 U.S.C. § 552(b)(7)(A), because it constitutes "records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement activities."

The documents requested by my client and withheld by the SEC must be disclosed under FOIA because the SEC cannot justify its assertion of Exception 7(A) under the law.

In order to withhold materials under Exemption 7(A), an agency has the burden of establishing that the exception at issue may be properly asserted under the law. Enviro Tech Intern., Inc. v. U.S. E.P.A., 371 F. 3d 370, 374 (7th Cir. 2004) ("The government bears the burden of proving by a preponderance of the evidence that a withheld document falls within one of the exemptions"); Hanson v. U.S. Agency for Intern. Develop., 372 F. 3d 286, 290 (4th Cir. 2004) (The government has the burden); Public Citizen Health Research Group v. Food & Drug Admin., 185 F. 3d 898, 904 (D.C. Cir. 1999) ("[T]he agency has the burden of showing that requested information comes within a FOIA exemption" *quoting* Niagara Mohawk Power Corp. v. U.S. Dept. of Energy, 169 F. 3d 16, 18 (D.C. Cir. 1999)).

To justify assertion of the exception here at issue, Exception 7(A), the SEC bears the burden of establishing that; (1) the records requested and at issue were compiled for law enforcement purposes, and; (2) the records at issue can reasonably be expected to interfere with enforcement proceedings. *See* Pratt v. Webster, 673 F. 2d 408, 413 (D.C. Cir. 1982); 5 U.S.C. § 552(b)(7)(A).

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To meet its burden under subpart (1) above, the SEC must demonstrate that “the files sought relate to anything that can fairly be characterized as an enforcement proceeding.” Tax Analysts v. I.R.S., 294 F. 3d 71, 78 (D.C. Cir. 2002) *citing* Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F. 2d 73 (D.C. Cir. 1974) *opinion supplemented on other grounds* 511 F. 2d 1347 (D.C. Cir. 1974). There are two types of investigatory files that government agencies compile; files in connection with government oversight of the performance of duties by its employees, and files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions. *Id.* Because here the records at issue involve a private actor, rather than a government employee, the SEC must identify an investigation that focuses directly upon specific alleged illegal acts to justify the SEC’s assertion of Exception 7(A).

To meet its burden under subpart (2) above, the SEC must outline a cogent 2-part analysis focusing on (a) whether a law enforcement proceeding is pending or prospective, and (b) whether release of information about it could reasonably be expected to cause some articulable harm. The mere pendency of enforcement proceedings is an inadequate basis to invoke the exception at issue. Courts hold the government must also establish that some distinct harm could reasonably be expected to result if the record or information requested were disclosed. Neill v. Dept. of Justice by Reno, 1994 WL 88219 (D.C. Cir. 1994) at *1 (Explaining that conclusory affidavit lacked specificity of description necessary to ensure meaningful review of agency’s Exemption 7(A) claims). Specificity is required of the SEC in defending its invocation of the law enforcement exception; it is well established that an agency must be able to point to a specific pending or contemplated law enforcement proceeding that could be harmed by disclosure. Mapother v. Dept. of Justice, 3 F. 3d 1533, 1542 (D.C. Cir. 1993) (“We believe that a categorical approach is appropriate in determining the likelihood of enforcement proceedings... Otherwise, we must exercise our faculties as mind-readers.”); Nat’l

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Sec. Archive v. F.B.I., 759 F. Supp. 872, 883 (D.D.C. 1991) (Reasoning that FBI's justification that disclosure would interfere with its overall counterintelligence program "must be rejected" as too general to be type of proceeding cognizable under Exemption 7(A), and permitting FBI to demonstrate whether there existed any specific pending or contemplated law enforcement proceedings).

ANALYSIS

The SEC did not justify its assertion of the law enforcement proceeding exception, Exception 7(A). Indeed, the SEC cannot plausibly claim it is investigating attempts by others to sabotage the Fidelity 100 heart device here at issue because, in two years of investigation: (a) the SEC did not seek discovery from any witness or agency appertaining or relating to such important matters, and; (b) the SEC intentionally did not seek investigative discovery from the multi-national companies possessing the source information. Therefore, the SEC did not demonstrate that: (1) the records requested were compiled for law enforcement purposes, **and**; (2) the records at issue can reasonably be expected to interfere with enforcement proceedings, because the SEC has not identified; (a) a specific pending or prospective law enforcement proceeding related to the FOIA request, and (b) that this specific request could reasonably be expected to cause some articulable harm. This, assertion of Exception 7(A) was erroneous and is unsupported in law.

Accordingly, the SEC must disclose the requested information to my clients.

CONCLUSION

For the foregoing reasons, I respectfully request the SEC reverse its denial of Request No. 11-02227-FOIA, and disclose the requested information.

THE LAW OFFICES OF

KRAMER & KASLOW

A PROFESSIONAL CORPORATION

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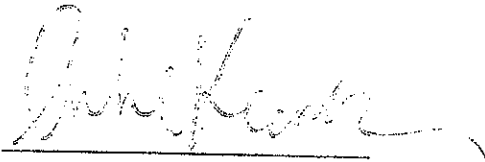
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Thank you for your consideration of this appeal. If you have any questions or require additional information, please do not hesitate to contact me.

Very Truly Yours,



Philip A. Kramer

Kramer & Kaslow

23901 Calabasas Rd., Suite 2010

Calabasas, CA 91302

(818) 224-3900

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
OFFICE OF THE GENERAL COUNSEL
100 F Street, N.E.
Washington, D.C. 20549-9612

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March 7, 2011

Please deliver the following pages to:

Name: Philip A. Kramer, Esq.

Fax Number: 818-224-3911

Subject: foia no. 11-2227

Total number of pages (including this cover sheet): ~~4~~

From: Celia Jacoby

Telephone Number: 202-551-5158

Telecopier Number: 202-772-9263

Notes:

Letter 2-17-11 and envelop as returned

EXHIBIT 3



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

February 17, 2011

Philip A. Kramer, Esq.
Kramer & Kaslow
23901 Calabasas Road, Suite 2013
Calabasas, CA 91302

Re: Appeal, Freedom of Information Act (FOIA) Request No. 2011-2227

Dear Mr. Kramer:

I am responding to your February 4, 2011, Freedom of Information Act appeal of the decision of the FOIA/Privacy Act Officer, Securities and Exchange Commission, denying your request for certain investigative records relating to Signalife, Inc. On January 8, 2011, the FOIA Officer denied your request pursuant to FOIA Exemption 7(A).¹ On appeal, you question that assertion. I have considered your appeal and it is denied.

I am satisfied that the FOIA Officer correctly asserted Exemption 7(A). Staff responsible for this matter have confirmed that releasing the withheld information could reasonably be expected to interfere with an on-going enforcement proceeding. *See OKC Corp. v. Williams*, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation); *National Public Radio v. Bell*, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (Congress intended that Exemption 7(A) would apply where disclosure may impede any necessary investigation prior to court proceedings); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) (Congress intended that Exemption 7(A) would apply "whenever the Government's case in court * * * would be harmed by the premature release of evidence or information"); *Accuracy in Media, Inc. v. U.S. Secret Service*, C.A. No. 97-2108, 1998 U.S. Dist. Lexis 5798, at *11 (D.D.C. April 16, 1998) (affirmation that there is an active and on-going investigation is enough).

Further, under Exemption 7(A), an agency may withhold records if they come within categories of records whose disclosure would generally interfere with enforcement proceedings.

¹Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A), 17 CFR 200.80(b)(7)(i).

Philip A. Kramer, Esq.

February 17, 2011

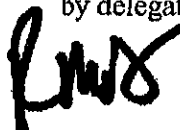
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Robbins Tire, 437 U.S. at 236; *see also Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998) ("the Government may justify its withholdings by reference to generic categories of documents"). The documents you seek come within categories whose disclosure would generally interfere with enforcement proceedings. To the extent that your appeal suggests that a *Vaughn* index should have been provided, it is settled that a requester is not entitled to receive one during the administrative processing of a FOIA request. *See Sakamoto v. EPA*, 443 F. Supp.2d 1182, 1189 (N.D. Cal. 2006); *Schwarz v. Dept. of the Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000) ("[T]here is no requirement that an agency provide . . . a '*Vaughn*' index on an initial request for documents."); *Edmond v. U.S. Attorney*, 959 F. Supp. 1, 5 (D.D.C. 1997) (rejecting, as premature, request for *Vaughn* index when the agency had not processed plaintiff's request).

Should you have a continuing interest in this information, you may contact the FOIA Office within six months of the date of this letter to determine if the status of the on-going law enforcement proceeding has changed. As Exemption 7(A) precludes the release of the information at this time, no determination has been made concerning the applicability of any other FOIA exemptions. The Commission reserves the right to review the information to assert any other exemption when Exemption 7(A) is no longer applicable. *See LeForce & McCombs, P.C. v. Dept. of Health and Human Services*, Case No. Civ-04-176-SH (E.D. Okla. Feb. 3, 2005) (an agency does not waive the right to invoke exemptions by not invoking such exemption during the administrative processing of a FOIA request).

You have the right to seek judicial review of my determination with respect to Exemption 7(A) by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business. *See* 5 U.S.C. 552(a)(4)(B). Voluntary mediation services as a non-exclusive alternative to litigation are also available through the Office of Government Information Services (OGIS). For more information, please contact OGIS at ogis@nara.gov, www.archives.gov/ogis, or 1-877-684-6448. If you have any questions concerning my determination, please call Celia Jacoby, Senior Counsel, at 202-551-5158.

For the Commission
by delegated authority,



Richard M. Humes
Associate General Counsel